Supreme Court, U.S.
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No. 88-1931

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PAUL CAMEN,

Petitioner,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEAL FROM THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether sanctions can be imposed against a party under Federal Rules of Appellate Procedure Rule 38 absence a showing of "Bad Faith" on the part of the party.

LIST OF PARTIES

Petitioner is PAUL CAMEN.

Respondent is SAFECO INSURANCE COMPANY OF AMERICA, A WASHINGTON CORPORATION.

Petitioner is the plaintiff-Appellant in the proceeding below.

Respondent is the defendant-Appellee in the proceeding below.

III.

ADOPTION OF THE MINORITY VIEW THAT SUBJECTIVE BAD FAITH IS REQUIRED TO IMPOSE SANCTIONS UNDER RULE 38 DEFEATS THE PURPOSES FOR WHICH THAT RULE WASENACTED AND INFRINGES UPON THE INHERENT POWER OF COURTS TO REGULATE THEIR CALENDARS.....16

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APPENDIX A. MOTION FOR SANCTIONS [C.C.P. 907] AND FOR A FINDING THAT THE APPEAL IS FRIVOLOUS [FRAP 36]

No. 88-1931

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

PAUL CAMEN,
Petitioner,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are accurately set forth in the petition.

JURISDICTION

Respondent agrees with the jurisdictional statement of petitioner as articulated in his petition.

FEDERAL RULE INVOLVED

Rule 38 of the Federal Rules of Appellate Procedure:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double cost to the appellee.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner, PAUL CAMEN, is an individual who resides in California. Respondent, SAFECO INSURANCE COMPANY, is a Washington Corporation which is authorized by the State of California to issue automobile liability insurance policies.

Prior to April 3, 1986, respondent had issued to petitioner an automobile insurance liability policy.

On/or about April 3, 1986, respondent opted not to renew the policy of insurance. In the District Court as well as in the Ninth Circuit Court of Appeal, the facts were undisputed that respondent had complied with all California Insurance Code regulations regarding non-renewal

of the policy, e.g., notice, etc..

On February 25, 1987, Petitioner filed suit in the Superior Court of the State of California. The suit alleged respondent violated Section 790.03 of the California Insurance Code when it refused to renew the policy.

The California Court of Appeal in Greene v Safeco Insurance Co., 140 Cal. App. 3d. 535, 189 Cal. Rptr. 791 (1986) held that Safeco had no duty under the terms of its policy, or otherwise, to renew the policy. The relevant language of the insurance policy in Greene was IDENTICAL to the language of the policy in the case at bar. Both policies provided explicitly that nothing would obligate the insurer to renew the policy. The legal issues raised were likewise identical to those raised by petitioner herein.

On April 2, 1987, respondent successfully filed a petition for removal of the action from California

state court to the District Court based on diversity of citizenship under 28 U.S.C. Section 1441.

Respondent moved for summary judgment. On September 3, 1987, the District Court dismissed petitioner's complaint suasponte on the ground that respondent insurance company had the right not to renew the policy.

Although respondent's attorney explicitly advised and warned petitioner's attorney that the issues underlying this action had been firmly decided in Greene, supra, and despite the fact that petitioner's attorney was advised that the language of the policy in Greene was identical to the language of the policy in the case at bar, petitioner and his attorney elected to pursue the appeal in the Ninth Circuit Court of Appeal. In a letter from respondent's counsel to petitioner's counsel, petitioner was advised that pursuing the appeal in light of Greene would be construed as

frivolous.

The Ninth Circuit Court of Appeals, possessing appellate jurisdiction pursuant to 28 U.S.C. Section 1291, affirmed the district court judgment in its opinion filed on January 20, 1989.

The Ninth Circuit Court of Appeals held that the California Appellate Courts had spoken on the issue of whether an insurer has a legal duty to renew an automobile insurance policy once a term had expired and cited Greene, supra, and Travelers Insurance Co. vs. Lesher, 187 Cal. App. 3d 180, 321 Cal. Rptr. 791, 803 (1986).

The Ninth Circuit Court of Appeals also held the appeal was frivolous under Federal Rules of Appellate Procedure 38 and granted respondent's motion for sanctions in the form of attorneys' fees and double costs. The basis for this award was not only the utter lack of merit to the appeal, but the fact that petitioner had been directly warned

of the consequences of pursuing the frivolous appeal, and nevertheless elected to proceed.

Petitioner subsequently filed a petition for rehearing and a suggestion for a rehearing en banc on the sole issue of sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure. The Ninth Circuit Court of Appeals denied the petition on March 14, 1989.

B. MATERIAL FACTS

The underlying claim of petitioner was that respondent violated California Insurance Code Section 790.03 when it failed to renew petitioner's automobile liability insurance policy. The policy in question explicitly provided that respondent had the unconditional right to refuse to renew the policy.

The language of the policy was identical to the policy in Greene, supra.

Prior to pursuing the appeal to the Ninth

Circuit Court of Appeal, petitioner, through his attorney, was advised of the holding in Greene, supra, and was advised that the two insurance policies were identical insofar as the relevant language was concerned. Petitioner's counsel was warned that the appeal was without merit and that it would be construed as frivolous. Despite the fact that Greene was directly on point and involved precisely the same insurance policy language, and despite the absence of any other pertinent authority to support petitioner's contentions, petitioner elected to pursue the appeal.

In the motion for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure, respondent pointed out that petitioner's attorney had been advised of the applicability of Greene and had been warned of the consequences of pursuing an appeal which patently had no merit. The motion also pointed out that the contention of

petitioner's attorney was fundamentally that the insurance policy in Greene was factually distinguishable from the policy in the present case. Since the relevant language of the two policies were identical, Respondent asserts that this contention of petitioner could not have been made in good faith. The Ninth Circuit court of Appeal very likely agreed with this assertion.

REASONS FOR DENYING THE WRIT

I

THE ACTIONS OF PETITIONER HEREIN WOULD BE CONSTRUED AS "FRIVOLOUS" UNDER ANY STANDARD, INCLUDING ONE REQUIRING EXPLICIT "BAD FAITH" AND A RESOLUTION OF THIS ISSUE IN THIS CONTEXT WOULD BE MORE IN THE NATURE OF AN ADVISORY OPINION.

In the case at bar, the Ninth Circuit Court of Appeals could have awarded sanctions pursuant to

Rule 38 of the Federal Rules of Appellate Procedure, regardless of which standard of "frivolousness" were being applied. This was not a situation where the only basis for the award was the lack of merit of the appeal. As noted supra, petitioner could have not have genuinely entertained a subjective belief that the appeal was meritorious.

Respondent would submit that a proper factual setting in which the Supreme Court should determine the issue of how Rule 38 was to be applied would involve a situation where the Circuit Court explicitly found there to be no subjective bad faith, and where the court based its award of sanctions solely on the lack of merit to the appeal.

Respondent contends that even if the most strict standard were applied, i.e., requiring a showing of subjective bad faith, that standard would be met under the present facts. Therefore,

a decision by this Court would have little practical effect on the outcome. The decision would be more in the nature of an advisory opinion.

Petitioner attempts to characterize the facts underlying the Ninth Circuit's order granting sanctions as involving a situation where the appeal was prosecuted in good faith, but was deemed frivolous solely because it lacked merit.

However, an examination of the motion for sanctions attached hereto as Appendix A discloses that Respondent's attorney advised Petitioner's attorney that the insurance policy in question had precisely the same language as the policy in Greene.

No litigant can demonstrate what another party or attorney is thinking. In jurisdictions where some showing of "bad faith" is required, such bad faith can only be demonstrated by reference to objective criteria. The only time that subjective

bad faith can be proved directly is where the party or attorney explicitly states that he is undertaking the appeal in bad faith, a situation which rarely, if ever, would take place.

Where, as here, a party and his attorney know of a controlling case interpreting precisely the same insurance policy language under the same circumstances, pursuing the appeal is in "bad faith" and would be construed as "frivolous" under any standard applied by the Circuit Courts of Appeal.

II

THE CIRCUITS COURTS OF APPEAL DO NOT VARY SUBSTANTIALLY IN THEIR PRACTICAL APPLICATION OF RULE 38

Petitioner contends that there is a great disparity amongst the Circuits in defining the term "frivolous appeal", as that phrase is used in Rule 38 of the Federal Rules of Appellate Procedure.

Petitioner points to a handful of cases which inferentially apply different or more strict standards than the majority.

Respondent contends that these differences are more a matter of semantics than substance. Furthermore, the differences may simply be attributable to the manner in which each circuit chooses to manage its own calendar. In practical effect, Respondent contends there is little difference between the circuits, and that, in any case, the great majority of circuits apply the principles applied in the Ninth Circuit Court of Appeals.

Rule 38 of the Federal Rules of Appellate Procedure, is premised upon existing case law, and complements 28 U.S.C. Section 1912, which states:

> "When a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

The Advisory Committee Note to Rule 38 cited a number of cases as illustrative of the allowance of damages, attorney's fees and costs where an appeal was found frivolous without requiring a showing that the appeal resulted in a delay, and Rule 38 is apparently a legislative recognition of the availability of such sanctions in the absence of any delay. These existing cases awarding sanctions demonstrate that Rule 38 was merely a codification of prior case law. (See: Dunscombe v Sayle 340 F 2d 311 (5th Cir. 1965), certiorari denied 382 U.S. 814; Lowe v. Willacy, 239 F. 2d 179 (9th Cir. 1956)).

Petitioner would have this Court believe that the Ninth Circuit Court of Appeals is inclined to grant sanctions whenever an appeal lacks merit. Petitioner contends that such an approach deprives good faith litigants of their access to the courts.

However, an examination of the approach taken

by the Ninth Circuit discloses that it is sensitive to its obligation to provide access to good faith litigants, and that sanctions are not awarded simply because an appeal lacks merit.

For example, in Grimes v C.I.R., 806 F. 2d 1451 (9th Cir. 1986), the court summarized its approach as follows:

> "We are sensitive to the obligation of the courts to provide access for petitioners seeking in good faith to avail themselves of the protection of the law, and we do not impose sanctions lightly. We are also aware that an appeal that lacks merit is not always frivolous."

The court continues, stating:

> "These principles do not, however, inhibit the court from imposing sanctions when presented with unsupportable appeals, presenting no colorable claim of error. Sanctions are appropriate when the result of an appeal is obvious and the arguments of error are wholly without merit. (citations)".

As noted above, the Ninth Circuit will not penalize appellants who act in good faith, but who are merely wrong in their contentions. The Ninth Circuit Court of Appeals limits sanctions to those situations where the appeal is so patently lacking in merit as the bad faith of the appellant and/or his attorney is inherent in the filing of such an appeal.

As pointed out in Petitioner's brief, a few courts have ostensibly require a showing of "bad faith" before sanctions would be imposed under Rule 38. (e.g., State of West Virginia v Chas. Pfizer & Co., 440 F 2d 1079, 1092 (2d. Cir. 1971).

However, even in the Second Circuit where a requirement of bad faith was deemed to exist in one case, other cases have applied a different standard more consistent with the other circuits, including the Ninth Circuit. For example, in Simon & Flynn, Inc. v Time Incorporated, 513 F. 2d 832,

834 (2d Cir. 1975), the court, apparently recognizing that the decision to undertake an appeal without merit, or without assessing whether it has merit may be objective evidence of bad faith, warned:

> "Counsel must realize that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk reaction to every unfavorable ruling."

Petitioner also cited Ruderer v Fines, 614 F. 2d 1128 (7th Cir. 1980) for the proposition that bad faith was required in the Seventh Circuit. While the Ruderer court ostensibly requires both that the appeal be frivolous and in bad faith, an examination of the manner in which this purported standard is actually applied discloses that it is, from a practical standpoint, no different than the approach in the majority of circuits.

The Ruderer court stated:

> "Typically the courts have looked for some indication of the appellants' bad

> faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for the purpose of delay or harassment or out of sheer obstinacy (citations)"

It is interesting to note that although Petitioner contends that approach is distinct from other circuits, the Ruderer court cites as authority for this proposition cases from the 7th, 9th, 2d and 1st circuits. It should be noted that in Ruderer, sanctions were in fact awarded.

The great majority of circuits hold that sanctions are appropriate under Rule 38 where it is found that the appeal is obviously without merit, the appellant's arguments totally unsound, the judges' time and energies wasted, and the appellee put to the inconvenience and expense of employing counsel to resist such a frivolous appeal. (Simon & Flynn, Inc. v Time Incorporated, Supra, supra, 513 F. 2d 832, 833-834(2d Cir. 1975); Monroe Auto

Equipment Co., Hartwell Division v National Labor Relations Board, 511 F. 2d 611, (5th Cir. 1975)); Hewitt v City of Stanton, 798 F. 2d 1230 (9th Cir. 1986) (sanctions proper where no plausible argument); Coghlan v Starkey, 852 F. 2d 806 (5th Cir. 1988) (finding of bad faith not necessary to impose sanctions where appeal frivolous); Braley v Campbell, 832 F. 2d 1504 (10th Cir. 1987) (intentional or reckless disregard of attorney's duties to court based on objective view of conduct is sufficient to impose sanctions without a showing of subjective bad faith); Ratcliff v State of Tex., 714 F. 2d 24 (5th Cir. 1983) (presentation of meritless arguments previously rejected in district court was frivolous warranting sanctions)).

In Sun Ship, Inc. v Matson Nav. Co., 785 F. 2d 59, 64 (3d Cir. 1986), the court stated:

> "Rule 38 focuses on the merits of the appeal regardless of good or bad faith."

The court held that where an appeal is utterly without merit, it is frivolous under Rule 38 and sanctions are appropriate.

In Asbury v Brougham, 866 F. 2d 1276 (10th Cir. 1989), the court held that subjective bad faith is not a prerequisite to sanctions and that an appeal "in which the result is obvious, or whether the appellant's claims are utterly meritless: is sufficient to impose sanctions. (Citing: Int'l Union of Bricklayers v Martin Jaska, Inc., 752 F. 2d 1401 (9th Cir. 1985) and Braley v Campbell, 832 F. 2d 1504, 1510-1512 (10th Cir. 1987))

In Natasha, Inc. v Evita Marine Charters Inc., 763 F. 2d 468, 471 (1st Cir. 1985), sanctions were awarded where, through a minimal amount of research, the Appellant could have discerned that its contentions were without merit.

When a court analyzes whether particular conduct is undertaken in bad faith, it must

necessarily examine objective criteria. In only the rarest of instances does a court have direct evidence of the what a party or his attorney are thinking. Subjective motivation must usually be inferred from objective criteria.

Respondent contends that the most critical factor in determining whether an appeal is undertaken in good faith is the merits of the appeal. Where, as here, the appeal is utterly lacking in merit due to definitive case law on the precise issue involved, where the facts are clearly not distinguishable, and where the appellant is explicitly advised that the appeal is therefore lacking in merit, the appeal must necessarily be construed to be in bad faith.

Similar logic was applied in Bailey v Bicknell Minerals, Inc., 819 F. 2d 690, 693 (7th Cir. 1987) where the court stated:

> "[T]he arguments are frivolous on an objective standard...Telling would-be

> litigants that the law is against them is an essential part of a lawyer's job... Plaintiff's lawyer...should have told his clients this. We therefore order counsel for the plaintiffs to pay, out of his own pocket, the attorney's fees reasonably incurred...in defending against the appeal."

Respondent believes that the criteria applied by the few circuits explicitly requiring "bad faith" and those which hold that utter lack of merit to the appeal justify sanctions, are from a practical standpoint, virtually the same. Pursuing an appeal which is utterly without merit is subjectively undertaken in bad faith. Therefore, the distinction between these tests is more in the nature of semantics, and in practice, has little significance.

III

ADOPTION OF THE MINORITY VIEW THAT SUBJECTIVE BAD FAITH IS REQUIRED TO IMPOSE SANCTIONS UNDER RULE 38 DEFEATS THE PURPOSES FOR WHICH THAT

RULE WAS ENACTED AND INFRINGES UPON THE INHERENT POWER OF COURTS TO REGULATE THEIR CALENDARS

Requiring an explicit showing of subjective bad faith would promote only one of the several purposes behind Rule 38. Respondent concedes that one of the purposes is to punish the appellant who interposes a frivolous appeal. However, the rule is also enacted in order to protect the Appellee from needless expenditure of time and money, and to permit the court to regulate its calendar and prevent the undue consumption of judicial resources on meritless matters.

In Burlington Northern R. Co. v Woods, 480 U.S. 1, 94 L. Ed. 2d 1 (1987), referring to Rule 38, this Court stated:

> "Under the Rule, 'damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant'. (citation)"

The Burlington opinion further states:

> "Rule 38 affords a Court of Appeals plenary discretion to assess 'just damages' in order to penalize an appellant who take a frivolous appeal and to compensate the injured appellee for the delay and added expense...Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals..."

Both this case and the advisory comment to Rule 38 recognize that the rule was enacted not only to penalize the appellant, but to protect the appellee. Furthermore, because Rule 38 emanates from existing case law, and because courts have certain inherent powers, one of its implied purposes is also to deter frivolous appeals and thereby allow courts to regulate their calendars. This court has recognized the benefit of a case by case approach giving the court of appeal plenary discretion.

A rule which would require a showing of subjective bad faith will do nothing to protect

Appellee's from the harm inherent in an appeal which is utterly lacking in merit. Such a rule imposes the entire burden of the appellant's incompetence on the appellee. Particularly where, as here, the appellant is represented by counsel, the burden of pursuing an appeal which is patently without merit should be placed on the party who caused it, not the innocent appellee.

In Clarion Corporation vs. American Home Products Corporation, supra, 494 Fed. 2d 860, 865 (7th Cir.) cert. denied, 419 U.S. 870, 95 S. Ct. 128, 42 L. Ed. 2d 303 (1974) a pro se litigant's attempt to relitigate matters which had become final was strongly rebuked, with the court stating:

> "Klein's cause of action since the dismissal of the case...has been frivolous and obstructive and has caused a shameful waste of judicial manpower.
>
> 'Rule 38 was designed to penalize litigants for just such tactics as those and to compensate those who have been put to the expense of answering such wholly frivolous

appeals [citations].

The "subjective belief" language of Grimes was also quoted with approval in Lefebvre vs. C.I.R., 857 F. 2d 420 (1st Cir. 1988).

If Rule 38 is to be used with its full measure of effectiveness to achieve all of its purposes, then the courts must be free to apply the Rule without regard to the subjective belief of the frivolous litigant. As the court in WSM, Inc. vs. Tennessee Sales Co., 709 F. 2d 1084 (6th Cir. 1983) said:

> "[W]ith courts struggling to remain afloat in a constantly rising sea of litigation, a frivolous appeal can itself be a form of obscenity. Rule 38 should doubtless be more often enforced than ignored in the face of a frivolous appeal." (WSM, Inc. at p. 1088)

If the courts were forced to find bad faith before they could apply Rule 38 the Grimes and Kleins of America would fast turn the "rising sea" of litigation into a flood.

The harm sought to be avoided by Rule 38 is the same whether or not the appeal is subjectively in bad faith. A litigant who pursues an appeal out of ignorance causes the same harm to the appellee and to the judicial system that an appellant who acts with subjective bad faith causes. Bad judgment is just as harmful as subjective bad faith. Penalizing the litigant is not the only purpose of Rule 38.

Petitioner quoted Florence Talamin et al vs. Allstate Insurance Co., 470 U.S. 1006, 85 L. Ed. 125, 105 S. Ct. 1824 (1985) for the proposition that "freedom of access to the courts is a cherished value in a democratic society" which should be preserved and not chilled with the imposition of sanctions which would result in hesitant litigants.

However, the Talamin Court went on to award $1,000 in sanctions against appellant's counsel holding:

> "Further while freedom of access to the Courts is indeed a cherished value, ever misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to judicial process. The time this court expends examining and processing frivolous applications is very substantial, and it is time that could be devoted to considering claims which merit consideration."
> (Talamin at 1827).

The Talamin court recognized the fact that while litigants with dubious claims might be chilled by the imposition of sanctions, those with valid claims certainly would be if denied access to a clogged court system.

The application of Rule 38 by the majority of courts encourages a party to seriously contemplate his decision before filing an appeal. Such an approach is favored by the courts.

This principle has even more apparent application to the facts in the case at bar. Not only was Petitioner put on notice of the lack of

merit of his claims by the order of dismissal by the District Court, but Petitioner's counsel was explicitly notified of the lack of merit to the appeal and given the opportunity to withdraw the appeal before Respondent was unduly burdened.

Where no subjective bad faith in the form of an ulterior motive exists, the courts must sill have a means of discouraging stubborn litigants like the instant petitioner who assert claims shown to be meritless. Such persistence in asserting a claim known to be without merit is itself bad faith.

"Where legal theories are strongly rejected below, the imposition of appellate costs is justified." (Biermann vs. C.I.R. 769 F.2d 707 (11th Cir. 1985), cert. den. 107 S. Ct. 1184)

Respondent would submit that pursuing an appeal on grounds that are known to be without merit is itself a sufficient showing of "bad faith". Although different circuits use different words to

characterize the test being applied, the practical result is essentially the same. None of the circuits have required an explicit showing of some ulterior motive and those which require "bad faith" construe persisting with an invalid claim as constituting bad faith. As a practical matter, Respondent therefore contends that the Circuits are essentially uniform in their application of Rule 38.

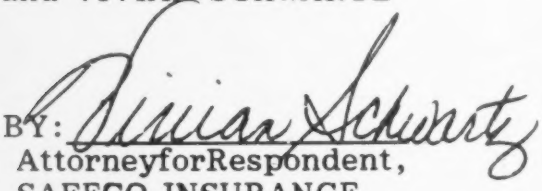
CONCLUSION

Based on the foregoing, it is respectfully submitted that: there is little difference between application of Rule 38 among the circuits; Petitioner's conduct in this proceeding would have justified the award of sanctions under any standard, including one requiring a showing of bad faith; and review by this Court is neither necessary, nor appropriate, in the context of these facts.

DATED:

Respectfully submitted,

L. E. SCHWEINER,
RICHARD G. FLANAGAN
and VIVIAN SCHWARTZ

BY: 
Attorney for Respondent,
SAFECO INSURANCE
COMPANY OF AMERICA

APPENDIX A

APPENDIX A

No. 87-6428

IN THE UNITED COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL CAMEN,

Plaintiff-Appellant,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,a Washington Corp.

Defendant-Appellee.

Case No. 87 02118 [JMI-Bx]

MOTION FOR SANCTIONS [C.C.P. 907]

AND FOR A FINDING THAT THE APPEAL

IS FRIVOLOUS[FRAP 36]

TO THE PARTIES HEREIN, THEIR ATTORNEYS OF RECORD AND TO THIS MOST HONORABLE COURT:

Please take notice and be advised that appellee SAFECO INSURANCE COMPANY OF

AMERICA, a Washington Corporation, hereby requests that this most honorable court render a finding that the appeal of appellant PAUL CAMEN is frivolous and that pursuant to FRAP 38 and C.C.P. Section 907 appropriate sanctions be assessed as against appellant. Dated: July 20, 1988 ROBERT P. BAKER and L.E. SCHWEINER By: ROBERT P. BAKER, Attorneys for Defendant-Appellee, SAFECO INSURANCE COMPANY OF AMERICA, a Washington Corporation

DECLARATION FOR ROBERT P. BAKER

IN SUPPORT OF MOTION FOR SANCTIONS

I, ROBERT P. BAKER, hereby declare that:

I am an attorney at law duly admitted to practice before all the courts of the State of California and am one of the attorneys of record for appellee, SAFECO INSURANCE COMPANY OF AMERICA, a Washington Corporation. All matters set forth in this declaration are of my personal knowledge unless otherwise specified and if called and sworn, I could and would so testify competently hereto.

On or about July 6, 1988 I received appellant's opening brief. I thereupon reviewed the arguments articulated and the legal support relied upon.

On or about July 15, 1988 I called the law offices of THOMAS WALL, counsel for appellant, to inform him that in my opinion his appeal was

frivolous. MR. WALL was not in his office, therefore, I left a message on his tape recorder.

On July 15, 1988, I memorialized my attempt to speak to MR. WALL with a letter. [A true and correct copy of said letter is attached hereto as Exhibit A and incorporated herein by reference.]

On July 18, 1988 MR. WALL called this defendant and we briefly spoke regarding the appeal.

I told MR. WALL that the policy language in the CAMEN insurance policy is exactly the same policy language which the court in Greene ruled was clear and unambiguous and which supported non-renewal. I invited MR. WALL to review the relevant portions of the CAMEN policy and compare same with the Greene decision. In fact I specifically pointed MR. WALL to the exact area of the policy.

I asked MR. WALL to consider withdrawal of

his appeal since his argument was entirely premised on his attempt to distinguish Greene and keep it from controlling. I pointed out to him that since the Greene court ruled on the exact same wording as was in the CAMEN policy I felt that case to have significant importance to the appeal.

MR. WALL declined to consider withdrawal of his appeal and indicated that he felt the court should decide the issue.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of July, 1988, at Van Nuys, California, Singed: ROBERT P. BAKER, Attorney for Appellee, SAFECO INSURANCE CO. OF AMERICA.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SANCTIONS

1. FEDERAL RULE OF APPELLATE PROCEDURE 38 ALLOWS DAMAGES AND SINGLE OR DOUBLE COSTS TO THE APPELLEE UPON A DETERMINATION THAT AN APPEAL IS FRIVOLOUS.

Appellee refers this most honorable court to its reply brief filed concurrently with this motion and based on the contents contained therein argues that appellant has not in good faith taken this appeal.

Appellant bases his appeal on the premise that the case of Greene vs. Safeco Ins. Co. (140 Cal. App. 3d 535 (1983)) is not controlling because the language interpreted in that case is different than the case at bar.

That this blatantly untrue and as the

declaration of ROBERT P. BAKER indicates, that fact has been communicated to MR. WALL, counsel for appellant, yet he continues to proceed.

It appears that this sort of action can only be considered either harassing in nature or frivolous.

2. CODE OF CIVIL PROCEDURE SECTION 907 AUTHORIZES THE AWARD OF DAMAGES SUCH AS MAY BE JUST WHEN THE REVIEWING COURT DETERMINES THE APPEAL TO BE FRIVOLOUS.

Appellee reiterates its argument, supra, and requests this court to impose sanctions and costs as appropriate and just against appellant for this frivolous appeal. Dated: July 20, 1988, Respectfully submitted, ROBERT P. BAKER and L. E. SCHWEINER, Signed, ROBERT P. BAKER, Attorneys for Appellee, SAFECO INSURANCE COMPANY OF AMERICA.

"Exhibit A"

July 15, 1989

Law Offices of THOMAS E. WALL
12063 Jefferson Blvd.
Culver City, CA. 90230

CAMEN VS. SAFECO
FEDERAL COURT CASE # 87 02118 (JMI-Bx)

Dear Mr. Wall:

This letter will memorialize my conversation to your office of July 15, 1988 at approximate 2:25 p.m. You were not personally in your office so I left a message on your telephone recorder.

I indicated to you that it was my opinion that your appeal is frivolous and subject to sanctions as authorized by CCP Section 907.

I informed you that the logic you express in paragraph eight and nine of your brief is erroneous, since the Camen's policy and the Greene's policy are both Safeco policies, with exactly the same wording.

I indicated I would not begin my reply brief after close of workday on Monday, July 18, 1988. If I did not hear from you by then with your client's decision regarding Continuance of the Appeal, it would be my decision to proceed with my reply brief and seek appropriate sanctions. Very truly yours, Signed, Robert P. Baker, RPB/reb.